Yuker Construction Co. *and* Local 247, International Brotherhood of Teamsters, AFL-CIO. Cases 7–CA–42275, 7–CA–42849, and 7–CA–43132.

August 30, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On October 5, 2000, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The General Counsel filed exceptions[1] and a supporting brief. The Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

The complaint alleged that the Respondent violated Section 8(a)(1) of the Act by discharging employees Randy Newberry and Dennis Purgiel for engaging in a protected concerted discussion regarding their wages, hours, and working conditions. The judge dismissed the allegations, finding that the General Counsel failed to prove that protected concerted activity was a motivating factor in the discharges, and alternatively that the Respondent would have discharged Newberry and Purgiel even in the absence of that activity. We agree.

The Respondent operates a commercial hauling business that slows down considerably during the winter months. Out of about 30 drivers, approximately 10–12 are typically laid off during the winter. Around the fall of 1999, the Respondent arranged to haul merchandise for Wal-Mart during the upcoming winter in an attempt to supplement its revenues and avoid layoffs. The Respondent offered this work to its drivers at 32 cents per mile.

The Respondent provides its employees with Nextel phones, which allow employees to communicate with one another or with company headquarters while on the road. The phones have a private and a group setting. On the private setting, only the two people holding the conversation can hear and participate. On the group setting, anyone in the company who has a Nextel can hear and participate. Anyone with a Nextel can change the setting from private to group.

About December 3,[4] while on driving assignments for the Respondent, Newberry and Purgiel had a conversation over their Nextel phones. Newberry mentioned that the Respondent had arranged to haul merchandise for Wal-Mart. Purgiel said he would not do the work for the 32 cents per mile that the Respondent was offering. Newberry said he would not do it either and had had enough "over the road" driving. Purgiel then stated that it was nearing the end of the season and that all of the Respondent's employees would soon be looking for jobs and signing up for unemployment. Newberry mentioned that Kelley Wilbur and Ron Steffes, two of the Respondent's former employees, had started their own business and needed drivers. Purgiel again stated that all of the employees would soon be looking for work or seeking unemployment. At this point, Benny Yuker, the Respondent's president, came over the Nextel and told Newberry and Purgiel to go back to the motel in which they had been staying and get their clothes because they were "done." Newberry and Purgiel drove back to the Respondent's offices, where Yuker terminated them. The termination papers, which Newberry and Purgiel refused to sign, listed the reason for termination as "actively seeking employment with other companies while on Yuker payroll."[5]

We agree with the judge that the General Counsel has failed to meet his burden of showing that the Respondent violated Section 8(a)(1) by discharging Newberry and Purgiel. The judge found protected Newberry and Purgiel's discussion of the rates of pay the Respondent intended to pay for the Wal-Mart work and their refusal to work for those rates. He further found, however, that the General Counsel did not meet his burden under *Wright*

[1] The exceptions relate only to the judge's dismissal of allegations that the Respondent discharged Randy Newberry and Dennis Purgiel in violation of Sec. 8(a)(1).

[2] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We will modify the judge's Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB No. 15 (Aug. 24, 2001).

[4] All dates are in 1999 unless otherwise specified.

[5] The Respondent reinstated Purgiel the next day, after he had lunch with Yuker, discussed the Nextel conversation with him, and explained that Yuker had misunderstood it. The Respondent did not reinstate Newberry. The judge found that this was because Newberry never offered any explanation to Yuker regarding the Nextel conversation and because Yuker was still upset with Newberry over an unrelated disagreement the previous week.

Line[6] of showing that Yuker discharged them for their protected dialogue.

Rather, the judge found, based on the surrounding context and his credibility resolutions, that Yuker decided to discharge them based on his mistaken belief that they were seeking other employment while being paid by him. In this connection, the judge found that another employee, who was not discharged, had made the same complaint that he was unwilling to perform the Wal-Mart work at the offered low rate. Regarding Yuker's misunderstanding of the conversation, the judge further found that when Purgiel told Yuker that he was just talking about supplementing his income and wanted to return to work, Yuker agreed that he should immediately return to work for the Respondent. Noting that Newberry had angrily confronted Yuker about another matter, the judge found that Newberry remained discharged because he refused to explain his behavior and ask for forgiveness.

The judge found that, in discharging Newberry and Purgiel, Yuker "shot from the hip" and acted hastily on a mistaken belief, but that such conduct does not constitute an unfair labor practice. We agree. See, e.g., *Manimark Corp. v. NLRB*, 7 F.3d 547, 552 (6th Cir. 1993) (employer may discharge employee for any reason, whether or not it is just, as long as it is not for protected activity (citing *NLRB v. Ogle Protection Serv.*, 375 F.2d 497, 505 (6th Cir. 1967), cert. denied, 389 U.S. 843 (1967))).

The judge also found, and we agree, that Newberry and Purgiel's discussion of their plans in searching for alternative employment in the winter months does not constitute concerted conduct within the meaning of the Act. There is no evidence that their talk was "engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees." *Meyers Industries (Meyers II)*, 281 NLRB 882, 887 (1986) (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) (if the only purpose is to advise an individual what he could or should do without involving others, then it is not concerted activity)), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). See, e.g., *Plumbers Local 412*, 328 NLRB No. 155, slip op. at 5 (1999) (individual's discussion with other clericals about wages and pensions not concerted activity). Compare *Whittaker Corp.*, 289 NLRB 933 (1988) (employee's protest of suspension of wage increase was clearly one to initiate group action).

In light of this analysis, we disagree with our dissenting colleague's application of *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964), which applies to terminations for alleged misconduct occurring during the course of protected concerted activity. Yuker's mistaken belief involved the significance of *unprotected* activity, one particular aspect of the conversation between Newberry and Purgiel that was not, in our view, intertwined with any protected activity. This case is quite unlike the situation in *Burnup & Sims*, where the employer's mistaken belief concerned statements supposedly made by employees in the course of soliciting another employee to join the union. The "misconduct" there clearly arose out of protected activity. Here, it did not, and thus the discharges had no potential deterrent effect on the exercise of Section 7 rights.

[6] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir 1981), cert. denied 455 U.S. 989 (1982).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Yuker Construction Co., Gaylord, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following as paragraph 2(c).

"(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

Dated, Washington, D.C. August 30, 2001

Wilma B. Liebman, Member

John C. Truesdale, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting.

Contrary to my colleagues, I would find that the Respondent discharged Randy Newberry and Dennis Purgiel in violation of Section 8(a)(1) of the Act.

As explained more fully in the judge's decision, the Respondent's commercial hauling business is seasonal and slows down significantly each winter. Although the Respondent performs some snow removal, this work is insufficient to keep all of its drivers busy. Consequently,

the Respondent typically lays off about 10–12 of its 30 drivers each winter.

To provide additional work and avoid layoffs, around the fall of 1999, the Respondent arranged to haul merchandise for Wal-Mart during the upcoming winter. The Respondent offered this work to its drivers at 32 cents per mile. Because the snow removal business historically had been insufficient to compensate for the slowdown in other hauling work, the drivers' likely alternatives to Wal-Mart work were to risk being laid off or to find interim employment elsewhere during the winter months.

About December 3,[1] drivers Randy Newberry and Dennis Purgiel had a conversation over their Nextel phones. They discussed the Respondent's arrangement to haul merchandise for Wal-Mart during the winter. Both Newberry and Purgiel stated that they were unwilling to do the work for 32 cents per mile, the amount the Respondent had offered. Purgiel, who had worked for the Respondent since August 1996, and therefore had experienced several slow seasons, pointed out that the slow season was approaching and that the Respondent's employees would soon be looking for other jobs and signing up for unemployment. Newberry mentioned that two of the Respondent's former employees (Kelley Wilbur and Ron Steffes) had started their own business and needed drivers. Purgiel reiterated that employees would soon be looking for other jobs and signing up for unemployment.

At this point, Benny Yuker spoke over the Nextel.[2] He told Newberry and Purgiel to go back to the motel because they were "done." Yuker terminated Newberry and Purgiel that day. Both Newberry and Purgiel refused to sign their termination notices, which stated that they had been "actively seeking employment with other companies while on Yuker payroll."[3]

In analyzing the December 3 Nextel conversation, the judge found that the portion relating to the wages offered for Wal-Mart work and refusal to work for those wages was protected concerted activity, but the portion relating to imminent layoffs and the need to obtain interim employment was not. I disagree that the conversation can be separated into two distinct portions, one of which is protected and one of which is not. As Yuker testified without contradiction, the very reason the Respondent obtained the Wal-Mart work was to have "an additional source of revenue for the drivers" during the winter months, in order to avoid the layoffs that otherwise would be necessary. Purgiel, whose testimony the judge generally credited, testified that his discussion with Newberry regarding the slow season and the upcoming layoffs "all start[ed] with this working for Wal-Mart." Thus, I disagree that Newberry's and Purgiel's discussion of the Wal-Mart work can be separated from their discussion of the upcoming slow season and possible alternate employment for the winter months. Rather, these issues were inextricably intertwined and part of a single conversation. I would find that the conversation was protected concerted activity in its entirety.

First, the conversation was concerted. I disagree with my colleagues that there is no evidence that the discussion of the upcoming slow season was "engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees." *Meyers Industries (Meyers II)*, 281 NLRB 882, 887 (1986) (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). As noted above, the two employees' discussion of the slow season cannot be divorced from their discussion of Wal-Mart work, which the judge found was protected concerted activity. Furthermore, "the object of inducing group action need not be express." *Whittaker Corp.*, 289 NLRB 933 (1988). Here, Newberry and Purgiel expressed their shared unwillingness to perform Wal-Mart work for the rates offered by the Respondent and discussed their alternatives to performing that work: seeking unemployment compensation or finding interim employment elsewhere. I would find their entire discussion to be concerted activity.[4]

[1] All dates are in 1999 unless otherwise specified.

[2] The judge did not make an express finding that Yuker heard Newberry and Purgiel discussing Wal-Mart work. The record, however, amply supports such a finding. Although Yuker testified that he did not recall hearing Newberry and Purgiel discuss Wal-Mart work over the Nextel, he conceded he did hear them discuss "peddling freight," which he "could construe . . . would point to the Wal-Mart job." Furthermore, as the judge noted, Yuker stated in his pre-hearing affidavit that he did hear Newberry say he would not do Wal-Mart work. Yuker testified at the hearing that the affidavit was true at the time he made it and that he must have remembered, at the time he prepared the affidavit, hearing Newberry make this statement. Finally, although the judge found that the Nextel transmission switched from private to group mode after discussion of Wal-Mart work was over, it is clear from Purgiel's testimony (which the judge generally credited) that Purgiel did not know for certain when the Nextel was switched into group mode. He simply realized he was on group mode when he heard Yuker speak. Similarly, neither Yuker nor Newberry pinpointed the precise time when the Nextel switched from private mode to group mode. Thus, the evidence supports a finding that Yuker heard Newberry and Purgiel discussing Wal-Mart work as well as discussing layoffs and the need for interim employment.

[3] Yuker reinstated Purgiel the next day, but never reinstated Newberry.

[4] This case is distinguishable from *Plumbers Local 412*, 328 NLRB No. 155 (1999), cited by my colleagues. In that case, a single em-

Second, the conversation had a protected purpose: discussion of their terms and conditions of employment. See, e.g., *Kinder-Care Learning Centers, Inc.*, 299 NLRB 1171 (1990) (Section 7 of the Act protects the right of employees to engage in activity for their mutual aid and protection, "including communicating regarding their terms and conditions of employment"). Here, those terms included low wages and an imminent slowdown in available work. Therefore, I would find that the discussion between Newberry and Purgiel was protected activity.

Because I find the conversation to be protected concerted activity in its entirety, I disagree that this case is governed by *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The judge found that Yuker terminated Newberry and Purgiel because Yuker mistakenly believed, upon overhearing their conversation, that they were seeking other employment while performing work for him. The standard to apply in determining whether an employer has violated the Act by discharging an employee for alleged misconduct arising out of protected activity is set forth in *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964). Under *Burnup & Sims*, Section 8(a)(1) is violated "if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct." 379 U.S. at 23. The Supreme Court explained:

> Otherwise, the protected activity would lose some of its immunity, since the example of employees who are discharged on false charges would or might have a deterrent effect on other employees. . . . A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith. It is the tendency of those discharges to weaken or destroy the § 8(a)(1) right that is controlling.

379 U.S. at 23–24.

Under *Burnup & Sims*, when an employee is discharged for misconduct arising out of protected activity, the employer has the burden to show that it held an honest belief that the employee engaged in misconduct. Once the employer establishes that it had such a belief, the burden shifts to the General Counsel to show that the misconduct did not in fact occur. See, e.g., *Pepsi-Cola Co.*, 330 NLRB No. 69, slip op. at 2 (2000).

Applying the *Burnup & Sims* analysis here, as noted above, I would find that Newberry and Purgiel were engaged in protected concerted activity. They were discussing their refusal to do Wal-Mart work during the slow season at the proposed wage and their alternatives to doing that work. Yuker overheard their conversation. Therefore, he knew of their protected concerted activity. The judge found that Yuker misunderstood their statements regarding potential interim employment and, based on that misunderstanding, discharged them in the belief that they were actively seeking outside employment while working for him. Thus, the Respondent carried its burden to prove it held an honest belief that Newberry and Purgiel engaged in misconduct. As the judge concluded, however, Yuker was mistaken, and Newberry and Purgiel were not actively seeking outside employment on the Nextel. Accordingly, I would find that the General Counsel carried his burden to prove that Newberry and Purgiel were not guilty of the misconduct for which they were terminated. Therefore, under *Burnup & Sims*, I would find that the Respondent discharged Newberry and Purgiel in violation of Section 8(a)(1).

Dated, Washington, D.C. August 30, 2001

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

Joseph P. Canfield, Esq. and Donna M. Nixon, Esq., for the General Counsel.
Paul Jacobs, Esq., of Detroit, Michigan, for the Charging Party.
Douglass A. Witters, Esq. (Pollard & Albertson, P.C.) of Bloomfield Hills, Michigan, for Respondent.

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. This case involves 1 alleged illegal no-solicitation rule; 19 allegations of conduct violating Section 8(a)(1) of the National Labor Relations Act, 1947, as amended, 29 U.S.C. Sec. 151 et seq., principally threats and interrogations; 1 allegation of withholding of holiday pay (1 allegation in Case 7–CA–43196 was withdrawn during the hearing); 3 allegations of discharges because of the employees' concerted and protected activities; and

ployee complained to other employees that she was not eligible for a particular pension plan in which certain other employees participated. The Board adopted the judge's conclusion that the complaining employee's activity was not concerted. In reaching her conclusion, however, the judge emphasized that there were no complaints by employees "to each other" and that "no one else was in the same or similar position to" the complaining employee. 328 NLRB No. 155, slip op. at 5. In this case, Newberry and Purgiel were similarly situated and did complain to each other about the upcoming slowdown and their unwillingness to perform Wal-Mart work for the wages the Respondent was offering.

2 persons who have particularly little regard for the truth, the husband and wife owners of Respondent Yuker Construction Co.[1]

Jurisdiction was conceded. Respondent, a Michigan corporation with an office and facility in Gaylord, Michigan, is engaged in commercial hauling of earth and related materials and, during the colder winter months, in snow removal. During 1998, Respondent purchased and received at its Gaylord facility goods valued in excess of $50,000 directly from suppliers located outside Michigan. I conclude, as Respondent admits, that it is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 247, International Brotherhood of Teamsters, AFL–CIO (Union), is a labor organization within the meaning of Section 2(5) of the Act.

My harsh assessment of the credibility of Benny, president, and Sue Yuker, secretary and treasurer, and their son, Robert, stems from two facts. Benny testified that he had not made various statements at an employees' meeting that he called in the summer of 1999. Robert initially recalled nothing of that meeting. Unfortunately for them, Benny's comments had been taped by one of the employees, showing that Benny lied. Respondent's former foreman, Bill Morey, a witness called by Respondent, testified on cross-examination that Benny and Robert had, indeed, or may have made a number of the threats that the complaint had alleged, not only at the meeting but also on other occasions. There was no evidence as strong as the tape discrediting Sue, but her testimony was just as indisputably false as if there had been a recording. She testified that the search for the motor vehicle records of employees had been merely normal, with the submission of the names of all the drivers to her insurance agent. Brenda Thorpe, a temporary secretary-clerk in her office, was called on rebuttal. She had nothing to gain from her testimony and plenty to lose, the possibility that she would not be employed again. She testified that Sue told her specifically to get the motor vehicle record of driver Brian Bedford, knowing that his driving record was so poor that he was uninsurable, giving her the excuse she needed to terminate him. In addition, Sue's testimony regarding the alleged "quit" of driver Kelly Wilbur in August 1998, was so patently false as to indicate that she was willing to say anything to salvage Respondent's and her husband's position in this proceeding. Finally, I am also convinced that Robert was driven by the same need, to protect his father, that he feigned a total lack of memory of the meeting and that he committed the very violations of which his father was accused, all in a plan to discourage the employees' support of the Union by repeatedly threatening the loss of their jobs.

I thus have not credited Benny, Sue, or Robert at all, except when they testified against the interests of Respondent or when their testimony was corroborated by unimpeachable sources or when their testimony, in light of all other facts, appeared probable. Because of their purposeful misstatements of fact, I have often found the very opposite of what they testified to, *Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). To the contrary, I generally found that the employees, both past and present, testified accurately. Some, admittedly, had something to gain by their testimony and thus a reason to fabricate. Others, however, did not. Dennis Purgiel, a current employee, testified against his interest by stating that he suffered no damages as a result of Respondent's discharge of him. I have thus credited him, wholly independent from, but certainly consistent with, Board law, which recognizes that the testimony of current employees that contradicts statements of their supervisors is likely to be particularly reliable. *Flexsteel Industries*, 316 NLRB 745 (1995), enfd. mem. 83 F.3d 419 (5th Cir. 1996). The testimony of current employees that is adverse to their employer is "given at considerable risk of economic reprisal, including loss of employment . . . and for this reason not likely to be false." *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1977). John Gorka, Ronnie Steffes, and Timothy Caverson had voluntarily left their jobs and had no interest in whether any of the allegations were found true or not, and their testimony is credited.

Although sometimes I had difficulty finding that the General Counsel's witnesses accurately perceived those events, particularly regarding the timing of some of them, I have attempted to put the events into a context that is most probable. Furthermore, although sometimes their testimony was not wholly consistent, I find that they did not make the events up from nothing. Thus, despite the fact that Benny had a surgical proceeding involving the implant of a stent in a vessel leading to or from his heart on July 21, 1999, and he testified that he remained in the hospital until the evening of July 22, and insisted that he did no work and made no telephone calls for 2 weeks, I find that Benny's claim that he stayed home for 2 weeks was not corroborated by either Sue or Robert. Furthermore, in light of the employees' testimony, I find that he disregarded doctor's instructions and conducted some business on July 22, and the following days, using his telephone while recuperating in the hospital and at home after his surgery and traveling within a week of his surgery. Two of the employees signed union authorization cards on Thursday, July 22, the date that appears of those cards, and would have recalled with accuracy the threats that resulted that day from their union activities. I thus agree generally with the timing recalled by most of the employees. Even if I am wrong, the events happened as narrated by the present and former employees, but on slightly different days.

In making these and other credibility findings, I have fully reviewed the entire record and carefully observed the demeanor of all the witnesses. I have also taken into consideration the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or the lack of it; and the consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other witnesses with similar apparent interests. Testimony inconsistent with or in contradiction to that on which my factual findings are based has been carefully considered but discredited. See, generally, *NLRB v. Walton Mfg. Co.*, supra at 408. Where necessary, however, I have set forth the precise reasons for my credibility resolutions, bearing in mind the oft-quoted advice:

[1] This case was tried in Grayling, Michigan, on August 1–2, 2000. The charge in Case 7–CA–42275 was filed on August 5, and amended on September 29, 1999; the charges in Cases 7–CA–42849 and 7–CA–43132 were filed on March 8, and June 12, 2000, respectively. The second consolidated complaint was issued on July 12, 2000.

"It is no reason for refusing to accept everything that a witness says, because you do not believe all of it; nothing is more common in all kinds of judicial decisions than to believe some and not all." *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950).

The first alleged unfair labor practice involves no issue of credibility. Respondent admits that it maintained since February 5, 1999,[2] the following rule:

> In order to prevent disruption of operations, interference with work and inconvenience to other employees, solicitation of any cause or distribution of literature of any kind on Company premises is not permitted.

This was not a valid no-distribution, no-solicitation rule because it prohibited employees from talking about the Union while on break or at lunch and barred distributions, without limitations. The Act protects the right of employees to solicit in nonworking areas or during nonworking times. Because Respondent's rule prohibited all distributions and all solicitations, including those that the Act protects, it was overly broad and violated Section 8(a)(1) of the Act. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Our Way, Inc.*, 268 NLRB 394 (1983); *Essex International*, 211 NLRB 749 (1974); *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962).

In July, most of Respondent's work was in the Detroit area, hauling aggregate (stone, sand, and gravel) from Rockwood Stone in Newport, Michigan, 245 miles from Respondent's base in Gaylord, to various highway construction sites. Ten to fifteen of the drivers were from out of town and stayed at an Econo Lodge (now a Day's Inn) (Motel) in Monroe, Michigan. The campaign to organize the employees started about July 22, when union representative Scotty Domine stationed himself at a market in Newport and solicited union authorization cards. Wilbur signed one on July 22. That day, Robert called him and asked whether the union representative had left the area yet. (Respondent had a Nextel radio or telephone system that was capable of permitting employees to talk privately with one another on a private channel and permitted Benny or someone from the company to talk with all the drivers on a public channel.) Wilbur replied that he did not know. In another call, Robert asked Wilbur whether he knew who had signed union cards and threatened that anyone who had signed a card could take his truck back to the Motel and clean it out because he no longer had a job. Robert also again asked if Wilbur knew who had signed cards. Wilbur replied that he did not. Finally, Robert asked Wilbur who he thought was responsible for Domine being there. Wilbur again denied knowledge. Benny also called Wilbur, asking what was going on there. Wilbur said that he did not understand what Benny was referring to. Benny mentioned Domine and said that anyone who signed a card would be fired: he would close Respondent's business, sell everything, and retire. Respondent would never have a union. Robert called again, to ask when Wilbur was going to return to Gaylord, because Robert had figured out who had started the organizing drive: it was Bedford and Dennis Diehl. Wilbur would take them back to Gaylord "because they were all done." However, when Wilbur returned to the Motel to pick up the two drivers, Robert was there talking with them; and Robert said that they were not going home with Wilbur.

On the same day, Gorka (who had signed a card) returned to the Motel and met Robert, who asked whether he had heard Benny on the group radio. Gorka replied that his group phone was broken. Others, however, heard Benny, who advised the drivers that anybody who signed a card might as well park his truck and clean it out "cause we were done." According to Bedford, Benny said that anybody talking to Domine or any other union representative should take their trucks to the boat dock, where Respondent stored its trucks and performed maintenance, and find some other way to get home because they could consider themselves fired; and that, if the Union was voted in, he was going to auction everything and close Respondent's doors. No matter whom I credit, I find that Benny threatened union supporters with discharge.

Robert told Gorka that there "needs to be a bunch of people fired today for signing Union cards." Gorka said that Respondent could not do that. Besides, Respondent had a good bunch of guys. What Benny needed to do was to meet with the drivers, because he had not kept the promises of benefits that he had made to them. Gorka then admitted that he had signed a card. On Friday, Benny called and asked whether he had signed a card. Gorka again admitted that he had. Benny then fired him, saying that he did not need him and could not trust him. Noting that he had loaned him money, Benny asked how Gorka could have done this, with Benny just having heart surgery, and added that he knew who had signed union cards. Gorka said that he would tear up his card and insisted that perhaps all could be solved with a company meeting. Gorka asked what he should do with the company truck, and Benny replied that he could take it home with him "for now," which indicated to Gorka that he still had his job. The following Monday, however, Benny called Gorka to tell him that he could not trust Gorka, because Gorka tried to sign up the mechanic and two of his helpers (which Gorka did the previous Thursday, in an attempt, he testified, to save face.) Gorka could park his truck at the boat dock, meaning that he was discharged. Benny continued that there would never be a union at the company; he would close the doors before he "would ever see a union come into this company." Gorka said that what he had done was a joke, that the "union cards" were actually index cards. Benny then said that Gorka could take his truck home and added that he would schedule a company meeting.

On Sunday, July 25, Wilbur was in his room at the Motel with Steffes when Robert walked in, holding a legal pad. He said that he had a list of the names of drivers who had signed cards; and he was going to figure out a legal way to "get[. . .] rid of these folks," either by firing them or laying them off. Respondent was not going to have a union. On July 27, before the meeting, Morey told Wilbur that he had spoken to both Benny and Robert, who had decided how they were going to handle "the union thing" legally: they were going to pick a day when all the employees would be laid off and then they would select for recall those drivers who, they believed, had not signed cards.

[2] All events occurred in 1999, unless otherwise indicated.

On Tuesday, July 27, Respondent held a meeting of the drivers at the Motel. Whether it was denominated as "mandatory," as most of the employees testified, the employees were clearly expected to attend and were paid for their time. (Respondent contends that this meeting took place on the following Tuesday, August 3, but there was no independent corroboration of this fact. The meeting was held in a conference room, for which, one would think, Respondent was charged for rental; but no receipt for the expense was offered.) Benny testified that he called the meeting to explain to the employees that his health and his heart procedure had caused him to think about whether to remain in business and to answer the employees' concern about the presence of appraisers whom Benny had (allegedly) hired to survey his fleet of equipment to determine its value for sale. Thus, according to him, the meeting began:

A. I explained why the appraise[r]s were around and what was being done and what I was looking at, my options because that's what I was there for.

Q. And what did you explain your options were?

A. Why the stuff was being appraised, if I was going to sell out. We're going to liquidate the assets or if we're going to continue in business. We were looking at the different options we had in front of us.

Q. Okay. So do I understand you to say that the union was never mentioned in that meeting or you don't remember if it was mentioned?

A. I don't remember if it was mentioned. I didn't mention the union.

Benny avoided, on direct examination, unequivocal denials. For example, asked by his counsel whether he said that he did not want the Union and that he was going to auction Respondent's equipment and shut the doors if the employees voted in the Union, Benny testified: "I went in and I told them exactly what was going on." He was more responsive on cross-examination. Then, he denied saying "if you get a union, we'll close the doors and sell everything," that "if they [the drivers] got a union, they all would be out of jobs," that he "didn't know why they wanted a union," that "they should have come to [Benny] with their problems instead of going to the union," and that "where are your union reps now," as the employees had testified. Only after he heard the tape did Benny reluctantly admit that he may have said in a different conversation, not at the meeting, that, if the Union came in, he would close Respondent's doors.

In truth, Benny arrived late and stormed into the meeting, attended by about 30 drivers. The following occurred:

> Benny Yuker You guys want a union, make up your minds. I don't[.]
> We're gonna have a union, then I'm selling. [*Indiscernible]* certainty.
> Unknown [Indiscernible]
> Benny Yuker It does when you do what you's have done. It's underminded. I tell you right now you done it the wrong way. I'm serious
> Unknown [Indiscernible]
> Benny Yuker I have health reasons. I know. My health. I'm not gonna tolerate it and put up with what's been going on. My health won't take it.
> I've got 12 years in this company and I'll sell the god damn thing. I'll cash out and I could live happily ever after and you're the ones who are gonna have to work.
> Unknown Can I speak
> Benny Yuker Yep
> Unknown [Indiscernible]
> Unknown Number one.....[Indiscernible]...what
> Benny Yuker Did the union straighten out your vacation pay? regarding the union.
> Unknown What did I just say Benny
> Benny Yuker Did the union get it straight. Did the union guy do anything for you?
> Unknown Please, I wish we could please just forget the union
> Benny Yuker Well, its pretty hard for me to forget it. You's are the ones who brought it up
> Unknown You told me you think the union guy could come in here and run you over and bowl you over and take over your company...number 1 that is not true. Number 2 we are the ones that are being walked over and bowled over by things [Indiscernible] going in and coming out of the office. All we need is to get with you like grown men and have a man to man talk
> Benny Yuker That's what you should have done then
> Unknown We tried
> Unknown This is what we have to do to get it
> Benny Yuker Maybe you didn't try
> Unknown We can't change that. We're here right now
> Unknown Remember when we asked you for ....*[Indiscernible]*
> Benny Yuker I don't care if you're for it or against it. There's not gonna be a union at Yuker Construction. There's not going to ever be.
> Unknown Oh I know that
> Benny Yuker I'll tell you that right now. There'll be an auction sale real fast.

After this, the session turned into a question-and-answer session, with the employees complaining about the benefits that they did not have, such as a 401(k) plan, even though some had been promised. Benny did not reply, other than to say that he or Sue would get answers to the employees in a few days. Benny passed out sheets of paper, or at least they were available at the front of the room, with the sheet divided by a line down the middle. The drivers were instructed to write the good things about Respondent on the left side and the bad things or things that they would like to have changed on the right. Benny was going to take the sheets home and was going to answer each and every one of the employees individually. The sheets did not have to be signed, but most of the employees signed, anyway.

Within a day or two of the meeting, probably on Wednesday, Robert sent six to eight drivers to work in St. Helen, north of Gaylord, but he also said that he might need them back in the Detroit area that Saturday. Wilbur requested that, if that was Robert's plan, he should tell the men on Thursday so, on Fri-

day, they could bring their clothes and leave from St. Helen to go to Detroit. Despite Wilbur's request, Robert announced only on Friday that the men were needed in Detroit for work on Saturday. Wilbur complained that Respondent never told them and that they did not have extra clothes. Benny then called, and Wilbur complained that it would be illegal for the men to drive all the hours that they needed to go home, get their clothes, and drive to Detroit; so Benny told him to drive the trucks to Gaylord and park them. He was going to sell them anyway and find a new job. Wilbur said that he would drive down to Detroit. Benny told Wilbur: "Anytime you get a wild hair up your ass you pull this kind of stunt." Wilbur said that "we had nothing to do with the union," but Benny repeated his orders and his threat to sell the trucks, adding that "[t]here wouldn't be a union." In August, Wilbur and Steffes quit; and, after that, Robert threatened Randy Newberry and Purgiel that if the employees voted in the Union, Benny would close Respondent's doors.

With the exception of a few allegations, this completes my recitation of the various allegations that do not require monetary relief—unlawful interrogations, accusations of disloyalty, threats to discharge union supporters, threats to sell and close Respondent's business and discharge all the employees, threats of unspecified reprisals, solicitation of grievances and promises of benefits, implications that it would be futile to select the Union as their bargaining representative because there would never be a union at Respondent, and the creation of the impression that the employees' activities were the subject of surveillance because Robert knew who had signed union cards. I conclude that Respondent violated Section 8(a)(1) of the Act in each respect.

On August 6, Wilbur decided to quit. He was told that he had to sign a quit sheet in order to get his last paycheck. He went to Respondent's office to pick up his check on August 20, but his final vacation payment was not on it. Employees earned 1 week of vacation as of the first anniversary of their employment. After an employee was employed for 3 years, Respondent paid 2 weeks of vacation. A week's vacation pay was computed by dividing the regular and overtime hours worked in the year prior to the employee's request by 52 (the request could be made at any time) and then paying for that amount by multiplying the hours by the employee's wage rate. Wilbur had already received 1 week's vacation pay in February (his anniversary date was January 30). Sue had no explanation for the omission of Wilbur's vacation pay on August 20. Failing to get an answer after several efforts, Wilbur was finally told by Sue on September 4, that she did not think that he deserved the vacation payment because of the way that he had quit and that the payment was a benefit for current employees. Wilbur then protested to Benny, who did not think that Wilbur should be paid because he was an "instigator" for the Union and had gone to a union meeting.

At the hearing, Respondent's reason for refusing to pay Wilbur was that Sue "discovered" sometime after January 1999, that Respondent erroneously paid Wilbur a vacation benefit in January because "it came to our attention that he had quit in August of '98." However, she had earlier testified that Wilbur announced to her personally that he quit, so her "discovery" was a fabrication. Besides, as will be seen, Respondent was careful to protect its pennies. When Newberry damaged one of Respondent's trucks and made private phone calls on Respondent's phone, Benny was quick to deduct the amounts from the his pay check. Yet Respondent never thought to ask for a return of, or deduct, the erroneously paid vacation check amounting to in excess of $500 that it had given to Wilbur in February 1999. Finally, as the counsel for the General Counsel explored Wilbur's payroll records to show that he had not quit in either August 1998, or January 1999, and that his testimony was truthful, Sue stretched facts and surmises to the breaking point, eliminating the possibility of a winter thaw and lack of snow to explain the fact that Wilbur had a slight reduction of hours in February 1999, without record support or corroboration, or that Wilbur was engaged in different work in August 1998, in order to support her claim that Wilbur had to have quit working, rather than merely having no work to do.

I find that Wilbur did not quit in August 1998, although he intended to, because he had a problem at home with his daughter and did not want to work out of town, as he had in the past. Benny, however, insisted that Wilbur did not have to quit, that Benny needed some more help in the shop in Gaylord, and that Wilbur could work there. Wilbur asked to take a week off, and took his vacation then for about 5 to 7 days. He returned, but worked only 2 or 3 days, when Benny sent him back on the road. Respondent's payroll records, which show that he was paid for work and for vacation during that period, are consistent with Wilbur's testimony. Respondent contended that it took away its truck no. 151, a new truck assigned to senior employees, because Wilbur was a new employee who had to "re-earn [his] stripes." In fact, when Benny needed Wilbur to drive, he was first assigned to a job doing concrete work and had to drive a truck suited to that job. Then he was assigned to a job in Grand Rapids and, within 2 weeks of his return to work, he was reassigned his original truck, showing that he was still a senior employee, entitled to the newest of Respondent's equipment.

In no other term and condition of employment was he treated as an employee who had quit and was newly rehired. Contrary to Respondent's practice of always requiring an employee to fill out a termination slip stating that he had quit before he could obtain his last paycheck (a fact that Benny loudly denied from counsel table while Sue was testifying), there was no record that Respondent asked Wilbur to fill out any such form. A mistake, testified Sue. Contrary to Respondent's practice, there was no indication in Respondent's records of Wilbur's employment history that he had interrupted his employment in any way. There was no record in Respondent's records that it considered that he quit at any time, and his date of hire on all his payroll records indicated January 30, 1996, never changed when he "quit" and was "rehired." Mistakes, testified Sue. His health and supplemental health insurance, which he would not be entitled to as a new employee, never lapsed; and Respondent never discontinued it. Benny's claim that there was no time to cancel it was unreal. Wilbur was paid for Labor Day, despite the fact that, had he quit, he would have been employed for about 20 working days, far fewer than the 90 working days (a day had to be more than 8 hours) that he needed to be paid holiday pay. In January 1999, Wilbur was paid for a week's vacation benefit. If he quit the previous August, he would have

been employed for only 5 months, far less than the year that he needed to be paid that benefit. That payment, too, Sue claimed, was a mistake. I find no mistakes. Respondent's records were accurate. Sue's testimony was false. Wilbur was owed his vacation pay when he asked for it in January because he had not earlier quit his job.

Respondent also relies on the fact that Wilbur quit on January 30, 1999, but Sue and Benny could not get their stories straight about what happened. Sue said that Wilbur quit in January 1999 for a week, then at least a couple days; Benny said that the day after Wilbur quit, he asked for his job back. Sue and Benny were apparently telling different stories to their attorney: Respondent's first position statement stated that Wilbur resigned in January and returned in March, but that was changed in a later statement that put Wilbur's date of quitting on Saturday, January 30, and his return on Monday, February 1, an indication that he missed hardly any time at all. In any event, as opposed to Wilbur's earlier unsupported quit, this time Respondent supported its claim with the quit sheet (lacking to support Wilbur's quit the previous August); but Wilbur claimed that he did not sign it, and Thorpe testified that she had never seen it in her file. My examination of the document reveals little difference between Wilbur's purported signature and the exemplars placed in evidence by Respondent. I find that he signed it. On the other hand, there is nothing in Respondent's payroll records that suggests that he quit, and there was no evidence that Respondent otherwise considered that he quit, such as taking away his health benefits. Usually, an employee's name would be removed from the payroll and the employee would be asked to return his credit cards and Nextel, the payroll clerk would sign for them, and Thorpe would remove the personnel file and store it in a box in the closet. Thorpe was never told anything about Wilbur's "quit" and never did anything. Finally, she testified that Wilbur kept his Nextel and Respondent's truck at all times and drove it back and forth from his home to plow snow every day. So, I find that, although Wilbur signed the form, Respondent never accepted it as a "quit." In any event, January 30 was the third anniversary date of his employment, so by that day he had earned 2 weeks' vacation pay. He took 1 week then, so he was owed an additional 1 week whenever he asked for it. There was no justification for Respondent's refusal to pay it in August. I conclude that the week's benefit was withheld, as Benny stated, because of Wilbur's union activities, in violation of Section 8(a)(3) and (1) of the Act.

The complaint alleges that Respondent discharged Purgiel, Newberry, and Bedford because they engaged in a concerted discussion involving wages, hours, and working conditions. During the winter months, Respondent's work typically slowed down, because there was no road construction work in the colder weather. The warmer-weather employee complement dipped to as few as 18–20 employees, performing snow removal, with the remainder of about 10–12 drivers laid off. In late fall, in order to supplement Respondent's income, Benny contracted with Wal-Mart to transport its merchandise and offered his drivers 32 cents per mile, an amount deemed inadequate by a number of drivers. Timothy Caverson advised Robert in December that the job did not pay enough, and he did not want it. On Tuesday, December 3, Newberry was driving to the Detroit area; and Purgiel was there, delivering aggregate. They were talking on the private channel of their Nextels about the weather and the scenery, and then Newberry mentioned the fact that Benny had set up tractors to haul for Wal-Mart. Purgiel said that he was not going to do it for 32 cents a mile. He was not an over-the-road driver and was not going to work out of state. Newberry said that he was not going to do the job either; he had enough "over the road." Purgiel said that it was just about the end of the season and that all the employees would be looking for jobs and signing up for unemployment. Newberry mentioned that Wilbur and Steffes had started their own business, A&L Steel, and they were looking for drivers. Purgiel said that all the employees were going to be looking for work because the season was ending and there was no snow on the ground so there would be no work plowing snow. The employees would be signing up for unemployment or looking for different work. At that point, the Nextel transmission switched from private, in which only Purgiel and Newberry could participate and hear, to group, where everybody in the company who had a Nextel could hear and talk. Benny then spoke. According to Purgiel, he said: "go back to the Motel. Get your clothes and bring them up North. You guys are done." Respondent contends that Benny never discharged Purgiel, in light of Purgiel's admission that he lost nothing because he delivered his load before returning to Gaylord; but Benny clearly fired him, as shown by Purgiel's testimony: "my first words to him were well, am I fired. And he goes well, yes."

They returned to the company's office, and both were given a paper that they were asked, but refused, to sign and which read:

Randy [Dennis] was let go because he was actively seeking employment with other companies while on Yuker payroll. This is a violation of Yuker trust and loyalty, behavior which is not in the best interest of Yuker Construction.

The General Counsel contends that the entire conversation between the employees was protected because their work was seasonal and what happened in the off season was a continuum to their overall job, to which they intended to return, citing in support *Southern Pine*, 104 NLRB 834 (1953). Furthermore, their discussion was really about a work dispute, and they were threatening to resign and take jobs elsewhere, designed to induce Respondent to act favorably on their wage demands, citing *Boeing Airplane Co.*, 110 NLRB 147, 149 (1954). Both Board decisions dealt with actions by employees to persuade their employers to meet their demands. Here, the employees were discussing merely their plans for the winter months. They were not asking Respondent to do anything, and they certainly made no demand for an increase of the amount that Respondent had offered to pay for driving Wal-Mart shipments. The General Counsel's contention that their discussions were a necessary prerequisite to confronting Respondent with a demand is based on no fact in the record and is merely speculative. "[M]ere talk" will only be found concerted when it is "looking forward to group action." *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

However, their discussion of what they would earn, that is, what Respondent intended to pay for the Wal-Mart job, and

their refusal to work for the rates he offered, was a concerted and protected activity. *International Business Machines*, 265 NLRB 638 (1982). The issue, then, is whether the General Counsel met its burden to prove, by a preponderance of the evidence, that Benny discharged Purgiel and Newberry because of that part of the conversation. *Club Monte Carlo Corp.*, 280 NLRB 257, 261 (1986), enfd. 821 F.2d 354 (6th Cir. 1987). I find that he did not. There is nothing presented in the General Counsel's case-in-chief that proved that this was the reason for the action that Benny took. Rather, the evidence in the case-in-chief tends to prove the very opposite. Caverson testified on behalf of the General Counsel that he complained that the Wal-Mart work paid too little and refused to do the work; yet he was not discharged. I conclude, therefore, that the General Counsel did not make a prima facie case supporting this allegation under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Naomi Knitting Plant*, 328 NLRB No. 180, slip op. at 3 (1999).

Assuming that this conclusion is incorrect, and in order to avoid a remand, I find that Benny's explanation of his reason for the discharge was anything but clear and rationale. He originally testified that

> They were talking about seeking other employment for the slow season coming up with A&L. And Randy was talking about going to work with Ronnie and Kelley. And they said we're all going to be laid off because the slow season is starting.

Benny said "[I]f you feel that way, bring your trucks to Gaylord now and get ahead [sic] start on everybody else seeking employment." He added:

> I'm not going to pay someone to look for employment on my time and driving my truck. The job I was paying him to do required his full attention. Not to be seeking employment while he was working for me.

Finally he said, in an explanation that applies equally to Purgiel: "Mr. Newberry was terminated because he was seeking in my opinion seeking employment on my payroll with my vehicle and my Nextel radio and was communicating that with other employees."

These employees were not seeking employment on the company radio. At best, they were talking about their plans for the winter; and Purgiel insisted to Benny that his conversation with Newberry was innocent, that they were discussing the slowdown of work and that they needed additional work to supplement their income, and that Benny misunderstood what they were talking about. He asked Benny to meet with him, to which Benny agreed, and then, and the next day, Purgiel insisted that he was merely trying to supplement his income during the slow season, to which Benny replied that that was "what I was trying to do." (Benny also testified, in answer to leading questions of his counsel, that Purgiel stated how important his job was to him, that he did not want to lose his job over something so foolish, and that he valued his job and wanted to come back to work for Respondent, but there is nothing to indicate that Purgiel's plea was what moved Benny to take him back, and in light of the leading questions, I discount this testimony.) Benny agreed that Purgiel should continue to work for him.

Newberry, however, never offered any explanation to Benny, who was upset with Newberry about another incident when Newberry persisted in his claim that he should not have suffered a salary deduction for damage that he caused to a hydraulic line on his truck. Newberry's insistence went to extremes, yelling in Benny's face and actually poking him with his fingers with such force that Benny staggered backwards and almost fell, for which Benny was furious. So, despite having engaged in the same conversation for which Purgiel was ultimately not disciplined, Newberry remained discharged because he refused to excuse his behavior and ask for forgiveness. I recognize that Benny testified that this altercation was not the reason for Newberry's termination and that the only reason was the conversation over the Nextel. Nonetheless, I find that the altercation formed part of his thinking in not reversing his decision about Newberry, while immediately reinstating Purgiel.

I find that Benny's thought that Purgiel and Newberry were looking for work on Respondent's radio was erroneous, and Benny seemed, by his reinstatement of Purgiel, to have understood that he acted hastily and without reason. The fact that he "shot from the hip" does not constitute an unfair labor practice. The Act provides a remedy for actions that violate its terms, but not for every discharge that is unrelated to Section 7 or 8(a). As the Board stated in *Meyers Industries* (*Meyers II*), 281 NLRB 882, 888 (1986), enfd. 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988), "The Board was not intended to be a forum in which to rectify all the injustices of the workplace." The General Counsel contends that they were discharged because they were complaining about the mileage rate that Benny offered for the Wal-Mart job. It is true that Benny stated in his affidavit that he overheard Newberry saying that he would not do the Wal-Mart job, a fact that he denied in his testimony; but Benny took no other action against anyone else, except Bedford, who maintained the same position as these two employees did. Caverson's testimony is directly contrary to the General Counsel's theory, because he was not discharged for refusing that work or griping about the amount that Benny was proposing to pay. In addition, I do not find that Benny's reason was a pretext. Benny acts without thinking. He sincerely was offended that the two employees were trying to obtain employment while being paid by him. Purgiel convinced him otherwise and Benny immediately gave him back his job; and there is no evidence that Purgiel was assigned to Wal-Mart jobs. I am persuaded that Respondent would have taken the same action even if the employees had not engaged in protected activity. *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996). Accordingly, I dismiss this allegation.

The reason for Respondent's discharge of Bedford was unclear. One reason was not the one that Respondent urged, that Bedford had so many points for speeding tickets that he was uninsurable. There is no question that he had the points and no question that he should not have been driving, but, according to Thorpe's testimony, everyone in management knew of Bedford's driving woes. Bedford had an accident on Labor Day weekend, as a result of which he was cited for, according to

Bedford's recollection, "failure to maintain a vehicle," and was hospitalized and so injured that he did not return to work until December. Bedford testified that he told Robert each time he received a new ticket, and Sue told Bedford at some time between August 1998 and March 1999 that, if he did not get that ticket dismissed, he would not be insurable. And the ticket was not dismissed, and he received two additional points in December, which he reported to Respondent, yet nothing was done; and he returned to drive for Respondent that month, 3 months after he had turned down Benny's invitation, made about 2 weeks after Labor Day and shortly before the September 20 representation election, to drive him to the voting location if Bedford promised to vote against union representation, which invitation is alleged in the complaint as, and I conclude is, a separate unfair labor practice. So it is probable that his union activities, whatever they may have been, including his refusal of the offer of the ride, did not have anything to do with his ultimate termination.

The General Counsel relies on the fact that he talked with various drivers, including Newberry and Purgiel, in late December or early January, who indicated that they were not going to haul for 32 cents an hour. Nonetheless, Bedford started to do Wal-Mart work when he returned to work in December, and, although Bedford's recollections were far from clear, he also worked at least in March, despite his mentioning to Benny that he was "kind of unhappy" about making less to haul for Wal-Mart than to haul aggregate for $12 per hour. Bedford then apparently stopped doing that work for a week, until Benny asked him to haul again, which Bedford did for another week, plus a Sunday, still complaining about the amount that he was paid for the work. Benny brushed aside his final complaints in late March, insisting that Respondent would be soon back hauling gravel and would call him for work as soon as he needed him. But, on April 13, the day that Sue requested a search of Bedford's motor vehicles record, an office secretary called to tell Bedford to take everything to the office and turn in his equipment. He was finished.

The General Counsel contends that Bedford never refused Wal-Mart jobs, was engaged in concerted activities, and was not complaining as an individual, because Benny had overheard Newberry and Purgiel discussing the low pay on the Wal-Mart job in December and Caverson had also made known his unwillingness to haul loads for Wal-Mart. This, then, showed a matter of common concern. But, by March, the Wal-Mart work did not appear to be a matter of common and concerted concern. The record does not show whether either Caverson or Purgiel was being assigned to Wal-Mart work or whether anyone else was still complaining about it. An individual employee acting with or on the authority of other employees and not solely on his or her own behalf is engaged in concerted activity. *Meyers Industries* (*Meyers I*), 268 NLRB 493, 497 (1984), revd. sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948, 971 (1985), decision on remand *Meyers Industries* (*Meyers II*), supra. There was no proof that the employees planned any action to protest anything, or that Bedford acted with or on the authority of anyone. He was not seeking to initiate or to induce or prepare for group action and was not bringing a group complaint to management. *Meyers II*, supra at 887. I conclude that the General Counsel did not prove that Bedford engaged in concerted activities. Thus, Respondent's discharge of him did not violate Section 8(a)(1) of the Act.

Again, assuming that my conclusion is erroneous, and in order to avoid a remand, I deal with the merits of the discharge to determine whether, even if the General Counsel had made a showing of a prima facie case, Respondent nonetheless would have terminated him; and, to do so, I must dispose of a preliminary procedural matter. The General Counsel subpoenaed "any and all documents submitted to the State of Michigan Unemployment Agency regarding Brian Bedford," but Respondent did not petition to quash the subpoena within 5 days from the date of service, as required by Rule 102.31(b) of the Board's Rules and Regulations. Its first mention of its refusal to comply with the subpoena came at the hearing, when Respondent contended that, under the Michigan Employment Security Act, M.C.L. § 421.11(b)(1)(iii), any documents used in connection with an application for unemployment benefits are prohibited from being used in a legal proceeding to which the Commission is not a party. I received certain proof and testimony subject to Respondent's motion to strike. It is not wholly clear on whether the 5-day rule must be strictly applied when there is a claim of a privilege. *M.J. Mechanical Services*, 324 NLRB 812, 834 (1997); *EEOC v. Lutheran Social Services*, 186 F.3d 959 (D.C. Cir. 1999); *NLRB v. Midland Daily News*, 151 F.3d. 472 (6th Cir. 1998). So, I consider the merits of whether the material is privileged. In *EEOC v. Illinois Dept. of Employment Sec.*, 995 F.2d 106 (7th Cir. 1993), the court held:

> When state and federal statutes clash, the Supremacy Clause of the Constitution gives the federal statute controlling force. Rule 501 of the Federal Rules of Evidence reinforces this message in the domain of evidentiary privileges. State privileges are honored in federal litigation only when state law supplies the rule of decision. When federal law governs, as it does here, only privileges recognized by the national govemment matter. Because state law does not apply, Rule 501 tells us to use "the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Unless we absorb the state's unemployment-insurance privilege into the common law of the United States, the EEOC's subpoena must be enforced.

Respondent gives no reason that the Michigan statute ought to undermine the right of the Board to obtain information to use in enforcing the Act. Respondent argues only that the statute says what it says and that evidence relating to a claim for unemployment compensation may not be received in evidence, citing *Herman Brothers Pet Supply v. NLRB*, 360 F.2d 176 (6th Cir. 1966), and *Summerville v. ESCO Co. Ltd. Part*, 52 F.Supp.2d 804 (W.D. Mich, 1999). However, *Herman Brothers* was not followed in *EEOC v. Illinois Department of Employment*, supra at 109, where the court found:

> Illinois reminds us that *Herman Brothers Pet Supply, Inc. v. NLRB*, 360 F.2d 176, 179–80 (6th Cir. 1966), held that a state statutory unemployment-compensation privilege prevented the use of information in a proceeding before the NLRB. Because the EEOC has the same evidence-gathering powers as

> the NLRB, Illinois insists, the EEOC is equally limited. *Herman Brothers* predates both *University of Pennsylvania* [*v. EEOC*, 493 U.S. 182 (1990), which declined opportunities to create new federal evidentiary privileges or expand old ones], and the adoption of Fed.R.Evid. 501. The sixth circuit assumed that state privileges apply in federal litigation. That assumption is no longer warranted.

The court in *Summerville* did not address the *EEOC v. Illinois Dept.* rationale, nor Rule 501, and I conclude that the better rule is that, where state privilege law conflicts with the enforcement of a federal statute and the privilege is not otherwise consonant with federal evidentiary law, state privilege law is not controlling. *Freed v. Grand Court Lifestyles, Inc.*, 100 F.Supp.2d 610 (S.D. Ohio 1998).

The records show that Respondent opposed Bedford's continued receipt of unemployment benefits on the ground that Bedford refused to take Wal-Mart trips and that Respondent contended finally that Bedford had quit because he refused so many offers of employment. That resulted in Bedford's disqualification from receiving unemployment benefits and an order to make restitution of $600. The record is not wholly clear, but Bedford probably refused one or more assignments on the ground that he had medical or dental appointments, but Respondent's claim of Bedford's refusal to accept assignments was inflated by lies. Sue and Benny instructed Thorpe to falsely record in Respondent's telephone logs calls that were never made—that Bedford was refusing loads or was called on certain days to take Wal-Mart runs—in a fraudulent effort to reduce their liability for unemployment insurance. The unemployment records thus show that Respondent's motivation was to rid itself of someone who was collecting unemployment insurance. What Benny and Sue did to may have been reprehensible and illegal, but does not constitute a violation of the Act. I thus find no basis for the complaint's allegation and dismiss it. I note also that the complaint alleges that Benny advised employees in March 2000, that, if they were dissatisfied with the rate of pay they were receiving from Respondent, they should find a different job. I assume from the timing that this related to the Bedford complaint; but there was no testimony about it, and nothing in the General Counsel's brief; and I dismiss the allegation.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, Respondent shall make Kelly Wilbur whole for 1 week's vacation pay, as computed in accordance with the formula set forth on page 7, above, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent shall also rescind its unlawful no-solicitation, no-distribution rule.

On these findings of fact and conclusions of law and on the entire record,[3] I issue the following recommended[4]

ORDER

Respondent, Yuker Construction Co., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating its employees concerning their union membership, activities, and sympathies.

(b) Accusing its employees of disloyalty because they engaged in activities on behalf of Local 247, International Brotherhood of Teamsters, AFL–CIO (Union).

(c) Maintaining an invalid no-distribution, no-solicitation rule forbidding its employees from discussing or distributing on behalf of the Union or any other labor organization on its property at any time.

(d) Telling its employees that they were discharged because they engaged in activities on behalf of the Union.

(e) Threatening its employees with discharge and unspecified discipline because they engaged in activities on behalf and in support of the Union.

(f) Threatening its employees that it would close its business and sell its assets because they engaged in activities on behalf and in support of the Union.

(g) Implying that it would be futile for its employees to select the Union as their exclusive bargaining representative by telling them that there would never be a union representing its employees.

(h) Creating the impression among its employees that their union activities were under surveillance by telling them that it knew which employees had signed authorization cards for the Union.

(i) Threatening to layoff all its employees and recall only those who had not engaged in activities on behalf and in support of the Union.

(j) Soliciting complaints and grievances from its employees and impliedly promising to remedy them.

(k) Telling its employees that they were not entitled to vacation pay because of their activities on behalf and in support of the Union.

(l) Offering its employees rides to an NLRB election if its employees promised to vote against the Union.

(m) Refusing to pay vacation pay to its employees because of their activities on behalf and in support of the Union.

(n) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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[3] The official transcript, particularly of the second day, is filled with inaccuracies and language that simply was not spoken, either by the person who actually made the comments or the person to whom the words were attributed. Nonetheless, the inaccuracies are not so severe that they alter the gist of the testimony or affect the integrity of the hearing. The General Counsel's unopposed motion for receipt in evidence of GC Exhs. 17(a) and (b), the tape and agreed upon transcript of the July meeting, is granted.

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Make Kelly Wilbur whole for any losses he suffered as a result of the discrimination against him, in the manner set forth in the Remedy section of the Decision.

(b) Rescind its invalid no-distribution, no-solicitation rule forbidding its employees from discussing or distributing on behalf of the Union or any other labor organization on its property at any time.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since February 5, 1999.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. October 5, 2000

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT interrogate our employees concerning their union membership, activities, and sympathies.

WE WILL NOT accuse our employees of disloyalty because they engaged in activities on behalf of Local 247, International Brotherhood of Teamsters, AFL–CIO (Union).

WE WILL NOT maintain an invalid no-distribution, no-solicitation rule forbidding our employees from discussing or distributing on behalf of the Union or any other labor organization on our property at any time.

WE WILL NOT tell our employees that they were discharged because they engaged in activities on behalf of the Union.

WE WILL NOT threaten our employees with discharge and unspecified discipline because they engaged in activities on behalf and in support of the Union.

WE WILL NOT threaten our employees that we would close our business and sell our assets because they engaged in activities on behalf and in support of the Union.

WWE WILL NOT imply that it would be futile for our employees to select the Union as their exclusive bargaining representative by telling them that there would never be a union representing our employees.

WE WILL NOT create the impression among our employees that their union activities were under surveillance by telling them that we knew which employees had signed authorization cards for the Union.

WE WILL NOT threaten to layoff all our employees and recall only those who had not engaged in activities on behalf and in support of the Union.

WE WILL NOT solicit complaints and grievances from our employees and impliedly promise to remedy them.

WE WILL NOT tell our employees that they were not entitled to vacation pay because of their activities on behalf and in support of the Union.

WE WILL NOT offer our employees rides to an NLRB election if our employees promised to vote against the Union.

WE WILL NOT refuse to pay vacation pay to our employees because of their activities on behalf and in support of the Union.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL make Kelly Wilbur whole for any losses he suffered as a result of the discrimination against him, with interest.

WE WILL rescind our invalid no-distribution, no-solicitation rule forbidding our employees from discussing or distributing on behalf of the Union or any other labor organization on our property at any time.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."